Supreme Court, U. S.
FILED
NOV 30 1976
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

Nos. 76-459
and 76-478

COMMUNICATION WORKERS OF AMERICA, AN UNINCORPORATED LABOR ASSOCIATION,

Plaintiff-Appellant,

vs

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, EXECUTIVE DIRECTOR, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, ALBERT F. MANGAN, IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, AND KENNETH C. RUSSELL IN HIS CAPACITY AS A MEMBER OF THE INDUSTRIAL COMMISSION OF COLORADO,

Defendants–Appellants

vs

WESTERN ELECTRIC COMPANY, INC., a NEW YORK CORPORATION AND THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, A COLORADO CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

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Appellee, Western Electric Company, moves the Court to dismiss the appeals herein or, in the alternative, to affirm the Judgment of the Supreme Court of Colorado on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

INTRODUCTORY STATEMENT

The decision of the Colorado Supreme Court below has been appealed by two parties to the state litigation. Plaintiff-Appellant Communications Workers of America challenges in substance the totality of that ruling. The Colorado Department of Labor and Employment, Division of Labor; the Colorado Industrial Commission; and various officials of these stage agencies, co-Defendants through five (5) years of state litigation, appeal only one procedural aspect of the lower court's decision, an issue also raised by Appellant Communications Workers of America. Different case numbers and titles have been assigned (i.e., *Communication Workers of America v. Western Electric Company, Inc.*, et al., No. 76-459; and *Colorado Department of Labor and Employment et al. v. Western Electric Co., Inc.*, et al., No. 76-478). However, the Clerk of this Court has given oral permission that a single Motion to Dismiss or to Affirm can be filed to cover both appeals, and that Appellee need only file the forty (40) copies of that Motion required for a single appeal. In compliance with those instructions, this Motion to Dismiss or Affirm is presented as to both of the aforementioned appeals.

QUESTIONS PRESENTED FOR REVIEW

1. DOES § 14(b) OF THE LABOR MANAGEMENT RELATIONS ACT AUTHORIZE STATE REGULATION AS WELL AS STRICT PROHIBITION OF UNION SECURITY AGREEMENTS?

2. MAY THE STATE OF COLORADO REQUIRE STATE CERTIFICATION OF A COLLECTIVE BARGAINING UNIT FOR THE SOLE PURPOSE OF DEFINING THE APPROPRIATE UNIT IN WHICH TO CONDUCT AN "ALL-UNION REFERENDUM" FOR PURPOSES OF REGULATING UNION SECURITY AGREEMENTS PURSUANT TO THE AUTHORIZATION OF § 14(b) OF THE LABOR MANAGEMENT RELATIONS ACT?

SUPPLEMENTAL STATEMENT OF THE CASE

Appellee Western Electric adopts in substance the statements of the case found in the Jurisdictional Statements of Plaintiff-Appellant Communication Workers of America (CWA) and Defendant-Appellant Colorado Department of Labor and Employment, Division of Labor, but submits the following supplemental material to clarify the proceedings below.

The instant appeals arise from two Declaratory Judgment actions filed by CWA against Defendants The Mountain States Telephone and Telegraph Company (hereinafter Mountain Bell) and Western Electric Company. Joined as Defendants were the Colorado Department of Labor and Employment, Division of Labor; the Colorado Industrial Commission; and various officials of these state agencies (hereinafter referred to as Colorado Department of Labor). The two actions were subsequently consolidated for trial and tried on a Stipulated Record of Evidence. At issue was the validity of certain union security provisions contained in seven (7) collective bargaining agreements between CWA and the two employers. The actions arose directly from the refusal of the employers to discharge about 100 employees of the two companies who had ceased making payments to the union, for a variety of reasons, of union dues or an amount equivalent to union dues. The union requested their discharge solely for this reason. The employers' refusal to discharge was predicated on the grounds that the applicable union security provisions were unenforceable in Colorado due to the fact that no all-union referendum

had been conducted by the Colorado Department of Labor and Employment, pursuant to the requirements of C.R.S. 1973, §8-3-108(1)(c), in their respective units of affected employees. All of the contested union security clauses contained statements that they were not applicable where "inconsistent with the law of such state." (See Clauses Reproduced at 551 P.2d 1069-1973).

The Colorado Department of Labor and Employment, Division of Labor; the Colorado Industrial Commission; and various officials of these state agencies, were named originally as nominal party Defendants only because they were charged with the duty of administering the Colorado Labor Peace Act and particularly the all-union referendum procedure. However, the parties agreed early in the litigation that there would be no action before the Industrial Commission or by it to enforce the law. From that time on, the State of Colorado basically did not participate in the case not even appearing for oral arguments at the trial or appellate level. By memorandum to the Court of Appeals dated February 18, 1975, the Attorney General indicated to that court that the state would not participate because both the court and the Industrial Commission had concurrent jurisdiction over the matter, as provided by C.R.S. 1973, §8-3-110(1), and that no ruling was required by the state defendants since no proceedings had been instigated before their respective agencies.

The union's primary contentions at the trial level were three-fold: First, that the contested contract clauses were not all-union agreements within the meaning of the Colorado Labor Peace Act; second, that the all-union referendum provisions of the Labor Peace Act were unenforceable because the state could only prohibit, not regulate, union security devices pursuant to §14(b) of the Labor Management Relations Act (hereinafter LMRA); and third, that the provisions of the Colorado Labor Peace Act were not intended to cover employers or employees subject to the jurisdiction of the National Labor Relations Board (hereinafter NLRB). (CWA Opening Trial Brief at 8-20; Reply Brief at 6-34). It

was in reference to these issues, as defined by the original pleadings, that the parties entered a stipulation of justiciability. The trial court resolved all of these issues in favor of the Defendants, and an Appeal to the Colorado Supreme Court affirmed the lower court's resolution as to these questions. The Colorado Supreme Court's resolution of the first and third issues constituted a conclusive resolution, as they presented issues solely of state law. As such, the issues were properly excluded from the instant appeals. The regulation/prohibition question constitutes one of the two issues that are brought before this Court by Appellant CWA.

In the opinion of the Colorado District Court, there was significant treatment of the issue of Federal preemption, but solely in the context of whether the state was free to regulate as opposed to a strict prohibition of, union security devices under the authorization of §14(b). The second issue currently before the Court (i.e., state certification of a collective bargaining unit for purposes of the all-union referendum) raises the issue of Federal preemption in a different context. The issue was not raised at the initial trial court level, and as such was not encompassed by the original stipulation of justiciability.

In its Briefs to the Colorado Supreme Court, Appellant CWA contended, *for the first time*, that, if the trial court's construction of the Labor Peace Act were correct, then the entire Colorado regulatory procedure was invalid on the basis of irreconcilable conflict with the certification powers extended to the NLRB by §9 of the LMRA. This assertion was founded on the union's conclusion that, if the all-union referendum provisions of the state legislation did apply to employers subject to the jurisdiction of the NLRB, then the state certification procedure for defining a "collective bargaining unit," as that term is used in the state act, also applied. Such a construction of the legislation would require that the state first conduct a collective bargaining unit election (as provided for in C.R.S. 1973, §8-3-104(4)) within the group of employees to be affected by the contemplated union security clause so as to define the unit in which the

subsequent all-union referendum was to be conducted. CWA's contention was that §9 of the LMRA preempted the state's authority to so certify a unit, and that the procedure was therefore invalid. (Opening Brief of Appellant on Appeal from District Court, City and County of Denver, at 22-26). Without making a significant evaluation of the merits of the claim of Federal preemption, both Defendant employers responded to this contention by stating that the Colorado legislation did not require the initial collective bargaining unit election to be conducted in those units subject to the jurisdiction of the NLRB.

The Colorado Supreme Court resolved this aspect of the appeal by concluding that the state collective bargaining unit election was a condition precedent to the conducting of an all-union referendum even in those units subject to the jurisdiction of the NLRB, but that such authority was not preempted by the NLRB's certification powers under §9 of the LMRA. 551 P.2d at 1076. However, the court expressly qualified the extent of its holding by recognizing that the state certification was only for purposes of defining a unit for purposes of conducting an all-union referendum, and was not certification for the general purposes of collective bargaining. 551 P.2d at 1078-79. The state certification authorized was not to establish a representative status as collective bargaining agent for the unit, but only a procedural mechanism in accomplishing the state regulation of union security agreements.

Two appeals have been taken from the Colorado Supreme Court's final disposition of the case. Appellant CWA raises essentially two issues: (1) state authority to regulate union security agreements pursuant to §14(b), and (2) whether or not the state's authority to certify a collective bargaining unit for the limited purposes stated has been preempted by §9 of the LMRA. Appellant Colorado Department of Labor appeals only from that part of the decision below that authorized limited state certification of the collective bargaining unit (i.e., issue No. 2). This Motion to Dismiss or Affirm is addressed to both of these appeals.

REASONS FOR GRANTING THE MOTION TO DISMISS OR TO AFFIRM

I. PRIOR DECISIONS OF THIS COURT HAVE CONFIRMED THE AUTHORITY OF A STATE TO REGULATE OR PROHIBIT UNION SECURITY PROVISIONS PURSUANT TO THE AUTHORIZATION CONTAINED IN §14(b) OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, AS AMENDED, 29 USC §164(b); ACCORDINGLY, THAT ISSUE PRESENTS NO FEDERAL QUESTION OF A SUBSTANTIAL NATURE.

Appellant Communication Workers of America (CWA) based this appeal in part on the question of the validity of the Colorado statutory provision (C.R.S. 1973, §8-3-108(1)(c)) which requires the holding of an "all-union" referendum as a condition precedent to the enforcement of a union security provision. The decisions of this Court in *Algoma Plywood and Veneer Company v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949) and *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963), conclusively resolve any dispute as to the authority of the individual states to so regulate application of union security provisions, pursuant to the authorization of §14(b) of the Labor Management Relations Act, 29 USC §164(b). The principle is firmly established that *where an issue has been conclusively foreclosed by prior decisions of the Court, it does not present a "substantial Federal question" sufficient to invoke the court's appellate jurisdiction pursuant to 28 USC §1257(2).* Accordingly, *review of this issue is not only unwarranted, but precluded.*

The court was faced with *this specific issue* in *Algoma* in the context of the Wisconsin all-union referendum provision, virtually the exact counterpart of the contested Colorado provision.[1] In response to the argument that §14(b) only

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[1] The statutory provision involved in *Algoma* provided:

> It shall be an unfair labor practice for an employer . . . to encourage . . . membership in any labor organiza-

authorized state prohibition, not regulation, of union security agreements, the court noted:

> *It is argued, however, that the effect of this section is to displace State law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment.* But if there could be any doubt that the language of the section means that the Act shall not be construed to

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[1] Continued
tion . . . by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds of such employees voting . . . shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board.
336 U.S. at 303-304.

The contested Colorado statute imposes a similar requirement, differing only in the majority vote required for approval:

> It is an unfair labor practice for an employer, individually or in concert with others to:
>
> * * * * * * *
>
> (c) Encourage or discourage membership in any labor organization, employee agency, committee association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit where three-quarters or more of his employees have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director.
> C.R.S. 1973, §8-3-108.

> authorize any "application" of a union-security contract, such as discharging an employee, *which under the circumstances "is prohibited" by the State*, the legislative history of the section would dispel it. *See* S. Rep. No. 105, 80th Cong. 1st Sess. 5-7; H. Rep. No. 245, 80th Cong. 1st Sess. 9, 34, 40, 44; H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess. 60; 93rd Cong. Rec. 3554, 3559, 4904, 6383-84, 6446; 94 Cong. Rec. 3613 (April 16, 1947); *Id.* at 3617-18; HR 3020, as reported, §13. (emphasis supplied).
> 336 U.S. at 313.

Quoting this passage verbatim, the principle was reaffirmed in *Schermerhorn*. 375 U.S. at 104. Indicative of the content of the legislative history upon which the court relied is the following passage from the House Conference Report on §14(b).

> "the United States expressly declares the subject of compulsory unionism one that States may regulate concurrently with the United States, notwithstanding that the State law limits compulsory unionism more drastically than does the Federal law."
> H. Rep. No. 510, 80th Cong., 1st Sess., p. 60.

In upholding the validity of the Colorado "all-union" referendum election in the decision below, the Colorado Supreme Court found the Court's decisions in *Algoma* and *Schermerhorn* to be controlling. Citing these two decisions the Court noted:

> C.W.A. contends that states, pursuant to §14(b), are allowed to "prohibit" but not to "regulate" union security agreements. No matter how this distinction may be interpreted, §14(b) does allow states to prohibit the "application" of union security agreements .... The provisions of section 80-4-6(1)(d) are an important incident of the state's power to prohibit the application of Union Security provisions such as the ones here in issue. That power has not been supplanted by federal law.
> 551 P.2d at 1079.

The effect of these prior decisions is controlling as to Appellant-CWA's entitlement to review of this portion of the state court's decision. Rule 16(1)(b) of the Supreme Court Rules, provides that a motion to dismiss an appeal can be founded on the premise that the issue does not present a "substantial Federal question." Both this Court and the lower Federal courts have repeatedly recognized that an issue does not present a substantial Federal question "if the claim is clearly foreclosed by prior Supreme Court decisions". Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction*, §3564. *Levering and Garrigues Company v. Morrin*, 289 U.S. 103 (1933); *California Water Service Company v. City of Redding*, 304 U.S. 252 (1938); *Ex parte Poresky*, 290 U.S. 30 (1933). In *Missouri Pacific Railroad Company v. Castle*, 224 U.S. 541 (1912), the court expressly recognized the appropriatness of application of the rule as to parties seeking the exercise of the court's appellate jurisdiction.

> Defendant in error moves to affirm the judgment under subdivision 5 of rule 6. The motion, we think, should prevail, since the questions urged upon our attention as a basis for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary.
>
> 224 U.S. at 544.

The principle was recently reaffirmed in *Hagans v. Lavine*, 415 U.S. 528 (1974), where the court noted:

> "[t]he question may be plainly unsubstantial, either because it is 'obviously without merit' *or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject* and leave no room for the inference that the question sought to be raised can be the subject of controversy.' (emphasis supplied).
>
> 415 U.S. at 537.

In spite of the discussions in *Algoma* and *Schermerhorn*, CWA urges the Court that the issue remains unresolved.

> Finally, all of the above raises the question of whether §14(b) permits any kind of "regulation" vis-a-vis union security provisions other than the enforcing of state statutory or constitutional provisions absolutely proscribing a particular form of union security.
>
> CWA Jurisdictional Statement at 33.

The union concedes that *Algoma* and *Schermerhorn* "indicate with clarity that a state may enforce such a provision" (CWA at 33), and yet appear to conclude that certain decisions of the National Labor Relations Board (NLRB), which they read to be in conflict with *Algoma*, could somehow qualify this Court's construction of the congressional enactment. There is little merit in such a contention even if Appellant's underlying premises are correct, *NLRB v. Waterman Steamship Corporation*, 309 U.S. 206 (1940), but the fact is that the NLRB has, since the decision in *Algoma*, recognized the validity of state regulation as well as prohibition of union security provisions. Admittedly, *prior* to the decision in *Algoma*, the Board's decisions in *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1948) and *Safeway Stores, Inc.*, 81 NLRB 387 (1949), held that state attempts to regulate union security provisions, as opposed to strict prohibition of such, were invalid, but the Board *reversed* its position in *Western Electric Company*, 84 NLRB 1019, 1949), relying expressly on *Algoma*. Sitting *en banc*, the Board was requested to hold a union shop authorization election for a certified bargaining unit that included employees in states that prohibited such clauses, states that regulated (Colorado and Wisconsin), and states that had no law relating to the issue. The Board did conclude that the appropriate unit for the election would only exclude employees in states that prohibited union security agreements, but expressly recognized that the results of the election could not authorize adoption of union security clauses in the regulatory states (i.e., Colorado and Wisconsin), until the employees in those states also approved such by the applicable percentage required in a state referendum election.

> "Contrary to the views of our dissenting colleagues, in our opinion, this result is not inconsistent with the

recent case of Algoma Plywood Co. v. Wisconsin Employment Relations Board, 69 S. Ct. [584], 1949 [16 LABOR CASES ¶65,013], where the Supreme Court held that the laws of Wisconsin regulating union security agreements had not been superseded by the National Labor Relations Act, as amended. *There is no necessary conflict, in our opinion, between that holding and the view which we adopt herein that the States and the Federal Government have concurrent jurisdiction to regulate the union shop, each being supreme in its own sphere.*

> *"It follows from this view that any certification which we may issue on the basis of the election directed below is to be construed as certifying only that federal requirements have been met by the petitioner for purposes of enforcing the National Labor Relations Act. The question of compliance by the petitioner with State Laws regulating the union shop is a question of State law to be determined by State authorities in a State proceeding."* (emphasis supplied)
>
> *Western Electric* at 1020.

Quoting this language from the decision in *Western Electric*, the Board in *Molders Union* (Malleable Iron Range Company), 150 NLRB 913 (1965), upheld the discharge of a non-union employee two (2) days after the union had won a union security referendum pursuant to the Wisconsin regulatory statute. The employee contended that the discharge was an unfair labor practice because the thirty (30) day grace period required in §8(a)(3) of the National Labor Relations Act had not expired, but the Board concluded that the employer's conduct must be evaluated in light of the state regulatory statute, which did not require such a grace period.

Obviously, the reliance Appellant CWA places on the NLRB decisions, the only authority for their assertion that the issue constitutes a substantial Federal question, is grossly misplaced. Their synopsis of the *Western Electric* decision (at 33) is correct as far as it goes, but misleading in that it does

not note the Board's qualification of the decision requiring further compliance with the state regulatory provisions. The synopsis of *Molders Union* is not only *misleading* but *actually inopposite* to the decision handed down by the Board. CWA contends that the case holds there was "no unfair labor practice when employee discharged pursuant to union security provisions *unlawful under state statute* which regulates union security provisions but does not absolutely prohibit such provisions." (emphasis supplied) (at 34), whereas the decision expressly concludes that "[I]n any event, since there is no provision in the Wisconsin Act for a grace period as is provided in the Federal Act, *it is clear that the Wisconsin Act was not violated when Garzynski was discharged for refusal to join the Union."Malleable Iron* at 915 (emphasis supplied). Although there was some question in the mind of the Board as to which body (the NLRB or the Wisconsin Employment Relations Board) would have had jurisdiction if the state statute had not been complied with, the decision conclusively recognizes that discharge without compliance with the state regulation would have been improper. Accordingly, CWA not only derives no support from these decisions, but they actually are in harmony with the interpretation of §14(b) advanced by Appellee and recognized by the Colorado Supreme Court and earlier decisions of this Court.

Accordingly, the Colorado Supreme Court's treatment of the validity of state regulation of union security provisions is in complete harmony with the decisions of this Court and the NLRB. Regardless of the merits of Appellants' attack on the "two election procedure" mandated by the Colorado Supreme Court, the regulation/prohibition issue raised by CWA *has been conclusively foreclosed by prior decisions.* Accordingly, the issue raised by this aspect of the instant appeal is so unsubstantial as not to require further argument. Should the Court note probable jurisdiction as to the validity of the "two election procedure" (see Discussion, *infra.*), arguments should be restricted to that specific issue, so as to avoid the necessity of further litigation of this aspect of the lower court's decision that is in complete accord with this Court's prior conclusive determinations.

II. THE QUESTION OF THE STATE'S AUTHORITY TO IMPOSE THE "TWO ELECTION PROCEDURE" MANDATED BY THE DECISION BELOW DOES NOT PROVIDE AN ISSUE SUFFICIENTLY "RIPE" SO AS TO CONSTITUTE A JUSTICIABLE CASE OR CONTROVERSY AT THIS POINT IN TIME.

Both Appellants attack the validity of the two election procedure mandated by the Colorado Supreme Court's interpretation of the Colorado Labor Peace Act. That element of the decision required that, prior to the holding of an all-union referendum election (the procedure approved in *Algoma*), the state division of labor must first certify the unit in which the referendum is to be held, by conducting an election to define the collective bargaining unit under the Colorado Act. C.R.S. 1973, §8-3-104(4). The decision of the Court expressly limited the scope of the state's certification to negotiation of union security clauses, realizing that the state could not usurp the NLRB's authority to certify for purposes of collective bargaining in general.

Irrespective of any merit raised by this issue, the question does not currently present a controversy sufficiently "ripe" as to warrant review. This Court has rigidly adhered to the principle that legislative authorization for the issuance of declaratory judgments has not abrogated the constitutional requirement of an actual case or controversy as embodied in Article III, Section 2 of the Constitution. *Aetna Life Insurance Company of Hartford, Connecticut v. Haworth*, 300 U.S. 227 (1937). Both the Colorado and Federal Declaratory Judgment Acts expressly so limit the Court's jurisdiction. 28 USCA §2201; C.R.S. 1973, §13-51-106.[2]

[2]For cases so construing the Colorado Declaratory Judgment Act, *see, American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944); *Farmers Elevator Company v. First National Bank* 176 Colo. 168, 489 P.2d 318 (1971); *Gabriel v. Board of Regents of University of Colorado*, 83 Colo. 582, 267 P. 407 (1928).

Though Appellants cite extensive case authority for the proposition that the contested procedure is directly in conflict with provisions of the national legislation and areas found to be exclusively reserved to the jurisdiction of the NLRB, no such finding has been made by federal courts. (See Discussion, Section III *infra*.) However, they contend in the alternative that application of the procedure will have such a disruptive effect on the conduct of orderly labor relations, and ultimately interstate commerce that the conclusion of Federal preemption is thereby mandated.[3] The very limited nature and purpose of the application of the two election procedure, as expressed by the court below, demonstrate that such an *evaluation at this stage is untimely* on the dual grounds that the controversy will not be "ripe" until the responsible state agency devises a procedure for implementing the Court's decisions so as to provide a specific factual context for evaluating the effects of the procedure, *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945), and so as to provide the opportunity to *avoid* a constitutional determination of Federal supremacy by state application of the process in a manner that avoids any possibility of Federal-state conflict. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). Legislative changes are also possible.

Appellants would have the Court determine the validity of this procedure in spite of the *numerous contingencies* the Court would have to resolve in reaching any Federal determination. This alone is sufficient to invoke the policies of judicial restraint embodied in the ripeness doctrine. *Electric Bond and Share Company v. S.E.C.*, 303 U.S. 419 (1938). Appellant Colorado Department of Labor concedes that in the past they have *not* applied this process of certification to any unit subject to the jurisdiction of the NLRB (Colorado Department of Labor Jurisdictional Statement at 7). Accordingly, they can only *speculate* as to the procedure that will be utilized and the resulting effects as to the particular units involved. Appellants cannot even state unequivocally that any unit ultimately certified by the state would cover different

[3]See CWA Jurisdictional Statement at 30, Note 5. See Colorado Department of Labor Jurisdictional Statement at 11.

Colorado employees than the comparable unit certified by the NLRB, but they speak only in terms of *hypothetical possibilities*. Indeed, even were the state to certify a different unit, it is necessary to speculate on the ultimate disruptive effect that such would have on labor relations and interstate commerce. Just as easily, it *could have none*. Though CWA would like to classify the procedure involved as being one of a "quintessentially representative" nature (CWA Jurisdictional Statement at 32), the procedure laid down by the Colorado Supreme Court is not in any respect definitive of a "representative nature," but is simply a procedural mechanism for regulating union security devices, *not collective bargaining*. The decision of the Colorado Supreme Court expressly recognized that state certification was only for the single and limited purpose of defining the scope of the state referendum election, and did not extend or presume any further collective bargaining authority. The general incidents of collective bargaining are still governed by the procedure of the National Labor Relations Act and the NLRB, regardless of any variance in state certification. Appellees and the Colorado Supreme Court agree. Accordingly, Appellants' fears of all or a portion of the Federally certified unit losing the "collective bargaining unit election" will only have the effect of precluding that Federally certified unit from negotiating any all-union agreements, the very power §14(b) was intended to extend to the states. *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963). If the procedure were truly of a "quintessentially representative" nature, it would also have the effect of conferring or denying full representative status and collective bargaining powers on some specified unit, as occurred in *Bethlehem Steel Company v. New York Labor Board*, 330 U.S. 767 (1947) and *LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board*, 336 U.S. 18 (1949). *Such is not the effect of the Colorado certification procedure*. Again, Appellants' concerns are nothing but *sheer speculation*.

This Court has expressly refused to review the decision of the Supreme Court of the State of Alabama in a declaratory judgment proceeding under a closely parallel fact situation, expressly on the basis of the "ripeness doctrine." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). In *McAdory*, plaintiffs had filed an action in the state courts for a declaratory judgment that certain provisions of the state labor code were invalid due to unconstitutionality, and alternatively, that they were preempted by the Supremacy Clause of the Constitution. The Alabama Supreme Court ruled in favor of the Act's validity. This Court originally granted certiorari, but ultimately dismissed the petition on the basis that the issues were not sufficiently ripe so as to provide for meaningful review, in spite of the Alabama Supreme Court's conclusion of the statute's validity. Specifically, the court noted the following as to Appellants' contention of preemption by the National Labor Relations Act:

> Each of the contentions which petitioners make with respect to the conflict of §§7 and 16 with the National Labor Relations Act could readily be adjudicated and disposed of in an adversary suit drawing in question their validity as applied to specific states of fact, in which respondents could both challenge the facts and the applicability to them of the statute. In the present suit we find that both the uncertainty as to the construction of the sections and the uncertainty as to the facts to which they are to be applied preclude the adjudication which the petitioners seek.
>
> 325 U.S. at 467.

* * * * * * *

It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the

> needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes.
>
> 325 U.S. at 471.

This result was in accord with the reasoning of Justice Douglas in *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740.

> Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress.
>
> 315 U.S. at 746.

Relying on the reasoning of *McAdory*, the principle was reaffirmed in *Public Service Company of Utah v. Wycoff*, 344 U.S. 237 (1952). In that decision, the court held it would be inappropriate to grant injunctive or declaratory relief against the state's attempted regulation of an interstate carrier, at least until such time as the state's regulatory statute had been applied in a specific factual sitting.

> Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. *We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected.* Alabama State Federation of Labor v. McAdory, 325 US 450, 89 L ed 1725, 65 S Ct 1384. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. (emphasis supplied)
>
> 344 U.S. at 247.

Finally, such an application of the ripeness doctrine was reaffirmed in *Wheeler v. Barrera*, 417 U.S. 402 (1974). In that decision, the court refused to decide the question of whether or not the application of Federal funds to include aid to parochial schools mandated by the circuit court's decision, would violate the First Amendment establishment clause, on the basis that the issue would not be "ripe" for review until the defendant board of education had devised a specific plan to implement the circuit court's mandate, so as to avoid a decision on a hypothetical state of facts. 417 U.S. at 426-427.

Both Appellants urge this Court that its prior decisions in *Bethlehem Steel* and *LaCrosse* are supportive of their assertion of preemption. Regardless of the relevance of these decisions to the particular procedure involved under the Colorado Labor Peace Act, both of these decisions demonstrate the obstacle to the instant appeal created by the "ripeness" doctrine. Such recognition is implicit in *Bethlehem Steel*, where the employer did not challenge the state legislation until subsequent to the state board's actual certification of the unit pursuant to the state authorization. In *LaCrosse*, the state board had certified a union rival to the one recognized by the employer, as the collective bargaining representative for his employees. In response to the contention that the state certification was just an intermediate step in the administrative process, and that there was no binding application of the state power until an actual unfair labor practice proceeding was initiated to enforce the certification, Justice Douglas expressly recognized the need for a specific factual setting before an evaluation such as the present Appellants' request can be made legitimately.

> If that contention is correct, the case is of course not ripe for the intervention of the federal judicial power.
>
> 336 U.S. at 21.

The conjectural nature of the determinations Appellants request this Court to make concerning the validity of the "two election procedure" demonstrates the appropriateness for application of the "ripeness doctrine." The fact that, though the lower court did expressly pass on this issue, the

question was not raised by CWA until the case got to the Colorado Supreme Court; was not even litigated below by the "Colorado Department of Labor"; and was not litigated on the merits by Appellees Western Electric and Mountain Bell based upon their construction that the statute did not require an initial collective bargaining unit election, further militates against review at this stage. Appellee therefore respectfully requests that the Court defer any determination as to the substantiality of the questions presented on the basis of nonjusticiability.

III. SINCE THE TWO ELECTION PROCEDURE MANDATED BY THE DECISION BELOW IS WITHIN THE SCOPE OF STATE AUTHORITY EXTENDED BY 29 USC §164(b), THE VALIDITY OF THAT PROCEDURE DOES NOT THEREBY RAISE A FEDERAL QUESTION OF A SUBSTANTIAL NATURE.

Independent of questions of justiciability, the validity of the "two election procedure" also fails to present the Court with a substantial Federal question. Appellants cite a dirge of authorities for the proposition that the "two election procedure" exceeds the scope of state authority under §14(b), but these authorities at best only tangentially touch upon the issue raised. This Court has on occasion had to determine the parameters of state power in asserting the authority granted by §14(b), but never in the context that the Colorado Labor Peace Act established as to state certification of a collective bargaining unit. The limited purposes of this certification do not exceed the scope of authority extended to the state pursuant to §14(b), hence application of the procedure is a permissible function of state authority over union security provisions, and as such, presents no Federal question of a substantial nature for the Court's resolution.

The issue is greatly obscured by the various decisions to which Appellants direct the Court's attention in support of their contention of preemption, while failing to put them in perspective with the fact situation presently before the Court. The proper point from which to initiate an evaluation of this

issue is the Court's explicit recognition in *Algoma* that §14(b) was included in the Act "to forestall the inference that Federal policy was exclusive in the matter of union security." 336 U.S. at 314. Recognizing the limited scope of §14(b), the Colorado Supreme Court in the decision below made explicit that, as to employees subject to the jurisdiction of the National Labor Relations Board, the state certification of a collective bargaining unit applied only for purposes of negotiating and executing an "all-union agreement," or participating in an "all-union referendum", state activities clearly authorized by §14(b). 551 P.2d at 1079. *See, Algoma, supra,* and *Schermerhorn, supra.*

Appellants reliance on this Court's decision in *Bethlehem Steel Company v. New York Labor Board,* 330 U.S. 767 (1947) and *LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board,* 336 U.S. 18 (1949), is misplaced, as neither of these decisions provide meaningful criteria for evaluating the Colorado two election procedure. In both of these decisions, the state had attempted to certify a collective bargaining unit for *all purposes* of collective bargaining. The Court's concern in each of these cases, and a consideration leading to a conclusion of Federal preemption, was the inevitable incompatibility of the dual regulation *of the same activities,* activities that the Federal legislation recognized to be areas of paramount Federal concern.

> Thus, if both laws are upheld, two administrative bodies are asserting a discretional control *over the same subject matter,* . . . . (emphasis supplied)
> 300 U.S. at 775.

Further reliance is placed on the dicta in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955), that the Federal provisions for certification of collective bargaining representatives carried with it "implications of exclusiveness." 348 U.S. at 476. Western Electric does not question the validity of any of these decisions, but recognizes that the present controversy does *not* involve the issue of certification *for purposes of obtaining representative status,* so that the cited precedent is of little, if any, value. State certification solely for the

purpose of delimiting the appropriate unit for purposes of conducting a state all-union referendum, as authorized by §14(b) and *Algoma* and *Schermerhorn*, is not analogous, or even comparative, to state certification for the purpose of establishing collective bargaining representative status. The present controversy simply does not involve the issue of representation as that term is normally used in labor law. There is no conflict between the two competing authorities, state and federal. Thus, the court in *Weber* expressly recognized that policies mandating the result in that decision were not present in those areas where the jurisdiction of the NLRB was not exclusive. 348 U.S. at 477. *See, Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942); *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

When put in context, it becomes apparent that the Court has not heretofore evaluated a procedure such as that presently in controversy. *Schermerhorn* recognized that *the scope of state authority under §14(b) would have to be determined on a case by case basis.*

> As a result of §14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field.
>
> 375 U.S. at 106.

Schermerhorn did establish that "state power, recognized by §14(b), begins only with actual negotiation and execution of the type of agreement described by §14(b), 375 U.S. at 105, but the court recognized that the conducting of a state mandated all-union referendum, prior to execution of a union security clause, was well within the scope of the term "negotiation." *Algoma, supra.* The Colorado modification of the Wisconsin referendum procedure does not sufficiently alter the nature of this process so as to withdraw it from the negotiation stage. Indeed, the Colorado collective bargaining unit election would appear to be an integral step in negotiations, as resort to such a procedure would not be made if the intention did not exist to execute a union security agreement.

The Court's recent decision in *Oil, Chemical and Atomic Workers v. Mobil Oil Corporation*, 44 U.S.L.W. 4842 (U.S. 1976), *supports* the reading given by the court below as to the scope of §14(b). Appellant CWA asserts a somewhat tortured reading of this decision.

> Mobil Oil reinforces the notion that §14(b) was not concerned with any aspect of the collective bargaining relationship between an employer and a labor organization until such time an employee is sought to be discharged pursuant to a union security provision.
>
> CWA Jurisdictional Statement at 28-29.[4]

To the contrary, as applicable to the instant appeal, the essence of the decision in *Mobil Oil* was:

> Since §8(a)(3) already prohibits the closed shop, the more restrictive policies that §14(b) allows the States to enact relate not to the hiring process but rather to conditions that would come into effect only after an individual is hired. It is evident, then, that §14(b)'s primary concern is with state regulation of the post-hiring employer-employee-union relationship.
>
> 44 USLW at 4845.

Obviously, the Colorado two election procedure applies only to the "post-hiring employer-employee-union relationship." The court also reaffirmed the principle adhered to since *Algoma* and *Schermerhorn* as to the broad scope of state authority when exercised within the confines of §14(b).

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[4] This obviously is irreconcilable with the Court's endorsement of the Wisconsin all-union referendum procedure in *Algoma* and is asserted in spite of the fact that the court in *Mobil Oil* cites *Algoma* extensively for the principle that:

> . . . §14(b) was designed to make clear that §8(a)(3) left the States free to pursue "their own more restrictive policies in the matter of union-security agreements."
>
> 44 USLW at 4845.

> We have recognized that with respect to those state laws which § 14(b) permits to be exempted from § 8(a) (3)'s national policy "[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws . . ." Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). The question here of course is whether Texas' contacts with this employment relationship are adequate to call into play § 14(b)'s mandated deference to state law.
>
> 44 USLW at 4845.

In evaluating for general purposes those areas left to state regulation after enactment of the National Labor Relations Act, the court noted in *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), that the legislature did not withdraw from the state "power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act." 359 U.S. at 243. Under varying circumstances this court has upheld the state's power to act, even though state authorization was not expressly recognized by the national legislation. *See, Automobile Workers v. Russell*, 356 U.S. 634 (1958); *Machinists v. Gonzales*, 356 U.S. 617 (1958); *Hanna Mining Company v. Marine Engineers*, 382 U.S. 181 (1965); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). The state activity embodied in the Colorado "two election procedure," incident to authority expressly granted to the state under § 14(b), is clearly of such a peripheral nature when evaluated solely within the limited scope authorized by the decision below.

Moreover, evaluation of the general guidelines laid down for application of the Colorado procedure indicates that the activity is well within a state's § 14(b) powers, so long as actual application will not eventually prove to have a disruptive effect on the conduct of harmonious labor relations. Appellant CWA expresses concern over the court's statement in *Schermerhorn* that:

> state power, recognized by § 14(b) begins only with the actual negotiation and execution of the type of agreement described by § 14(b).
>
> 375 U.S. at 105.

However, the decision below recognized this limitation and noted that the Colorado procedure (i.e., the collective bargaining unit election and the subsequent all-union referendum) would be initiated only *after* the clause had been originally negotiated by the federally certified bargaining representative.

> State power, pursuant to § 14(b), begins with the actual negotiation and execution of the type of agreement described by § 4(b). Retail Clerks Local 1625 v. Schermerhorn, supra. Negotiation and execution of the contested agreements between C.W.A. and Mountain States and between C.W.A. and Western Electric has occurred, and thus the state's power under § 14(b) has become operative.
>
> 551 P.2d at 1078.

This particular procedure demonstrates the harmonious nature and the essential interplay of the proper functioning of both authorities (i.e., the NLRB and Colorado Department of Labor) certification functions. The Board's original certification and the established bargaining representative's negotiation of a collective bargaining agreement containing a union security provision will give rise to the necessity of the conduct, by the Colorado Industrial Commission, of two elections, as required by the Labor Peace Act. Appellant CWA appears particularly concerned with the possibility of the state collective bargaining unit election resulting in a different representative being certified by the state election.[5] The insignificance of this concern is obvious, for, as the opinion below made clear, the state's certification is only for purposes of entering into a binding union security provision. 551 P.2d at 1079. CWA's conclusion in Note 22, Page 27, that "[M]oreover, because each "collective bargaining unit" can designate its own 'representative,' it would appear possible for a minority union to be so designated", is entirely *unsupported* by the decision below. The court expressly noted that the *state certification was only for purposes of negotiating a union security clause as part* of the *overall* collective bargaining *agreement*.

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[5] See CWA Jurisdictional Statement at 27, Note 22.

> . . . the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in §14(b) of the Taft-Hartley Act. The application of section 80-4-2(6) to the union security provisions of the Colorado Labor Peace Act is severable from its application in other contexts of the Act.
>
> 551 P.2d 1065.

It would seem apparent that, even assuming *arguendo* a rival representative could be designated in this election, it would be of no value to represent a unit for purposes of negotiating a union security clause, when there is no authority to represent the unit for any other purposes of collective bargaining. Western Electric doubts that the division of labor would implement the election requirement in such a manner. Such is clearly not required by the decision of the Colorado Supreme Court, and further demonstrates the speculative nature of the entire controversy.

Western Electric concedes that the procedure which the Colorado Supreme Court required under the Colorado Labor Peace Act may seem cumbersome judged in a vacuum, but the problems presented are ones particularly appropriate for resolution by state authorities, and they have had *no opportunity yet to act*. The Department of Labor concedes in their Jurisdictional Statement that:

> Finally, and most critically, the state will be obligated to conduct elections to redetermine units already recognized or certified by the National Labor Relations Board. This election process will cost the state large sums of money, will create additional administrative burdens, and may invalidate contract provision concerning union security for which a referendum was held, but no Colorado unit election was conducted.
>
> Colorado Department of Labor Jurisdictional Statement at 11-12.

These obviously are not concerns properly brought to this forum and were never raised anywhere below. Unless enforcement of the procedure should prove disruptive (a determination impossible to make at this stage), the process is totally limited to accomplishment of the state objectives authorized by §14(b), and exercised within the parameters of that legislation. Indeed, the fact that many of the NLRB certified units encompass employees of a *multi-state* area mandates some delimitation of the unit by the state prior to the conducting of an all-union referendum, and *Appellants' construction* of the scope of §14(b) would appear to invalidate *any* method of defining the appropriate unit for an *intra-state* referendum, which is all Colorado lawfully can require. *Algoma* conclusively refutes any such proposition. Implicit in *Algoma* is the recognition that the state, in exercising its regulatory powers over a Federally certified multi-state bargaining unit, must of necessity re-define that bargaining unit, as state authority can only be exerted over employees working within the state. The decision below only serves to define the method by which this is accomplished. Accordingly, the issue raised is essentially one of state law and does not raise a Federal question. Even if the initial determination of whether or not this is a matter of state law constitutes a Federal question, the preceding discussion indicates that the Federal question presented is not of a substantial nature.

CONCLUSION

WHEREFORE, Appellee Western Electric respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the Judgment entered in the cause by the Supreme Court of Colorado.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 1976, three copies of the within MOTION TO DISMISS OR AFFIRM, were mailed, postage prepaid to:

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